No. 12,261

IN THE

United States Court of Appeals

For the Ninth Circuit

COMPANIA ENGRAW COMERCIAL E INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION (a corporation),
Defendant and Appellee,

and

SCHENLEY DISTILLERS CORPORATION (a corporation),
Defendant and Appellant,

vs.

COMPANIA ENGRAW COMERCIAL E INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellee.

PETITION OF APPELLANT, SCHENLEY DISTILLERS CORPORATION, FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable William Denman, Presiding Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

PRELIMINARY STATEMENT.

Cross-appeals were taken in this case, and the decision of this Honorable Court was adverse to petitioner in both appeals. While petitioner believes its appeal was meritorious, this petition will not be devoted to a reargument of the points there raised, for it appears settled that a petition for rehearing cannot properly be so used. However, with respect to the question of damages (the issue raised in Engraw's appeal) this Honorable Court overlooked a fact which, under its own decision, requires a result totally different from the conclusion reached.

The sole purpose of this petition is to call the Court's attention to this important, uncontested fact adduced by Engraw itself.

GROUNDS FOR PETITION FOR REHEARING.

Petitioner respectfully urges that this Honorable Court order a rehearing in this case or modify its opinion because, under the law stated by this Honorable Court, damages can be assessed only as of September 18, 1946, because of the fact, which the Court overlooked, that on that date Engraw in writing unequivocally acquiesced in Schenley's repudiation.

I.

UNDER THE LAW AS STATED IN THE DECISION THE UNCONTRADICTED FACTS REQUIRE THAT DAMAGES BE FIXED AS OF SEPTEMBER 18, 1946.

Petitioner argued, in support of the award of damages, that where an executory installment sales contract is repudiated by the buyer, and the seller acquiesces in the repudiation, damages are fixed as of the date of such acquiescence.[1]

Engraw never challenged this rule as such, but denied its application to this case, arguing that it did not acquiese *on June 6, 1946.*

The opinion shows that this Honorable Court is also in agreement with the rule as such.

The question before this Honorable Court then, was one of fact: Did the evidence support the finding that Engraw *on June 6, 1946,* acquiesced in Schenley's repudiation?

The Court held that Engraw did not acquiesce on June 6, 1946. For the purposes of this petition, that holding must, of course, be accepted.[2]

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[1]This of course does *not* mean that the contract is at an end in the sense that it has been cancelled by mutual consent. It merely means that neither party contemplates performance of the contract. The seller, by his acquiescence, relieves himself from further responsibility for deliveries, and deprives the buyer of the right to withdraw his repudiation and accept performance. In either event, of course, the injured party has his action for damages.

[2]It would seem, however, and the trial Court found, that negotiations for the purposes of liquidating the agreement and any liability of Schenley, and the performance of the alleged agreement as made, are necessarily inconsistent.

However, this Honorable Court did not thereupon consider or note the fact that Engraw *did unquestionably* acquiesce on September 18, 1946, by a letter which it pleaded, and which was called to the attention of this Honorable Court in the briefs. The opinion erroneously assumes that June 6 was the only date on which an acquiescence could have been made, and it proceeded, apparently, to *bind* the trial Court to fix damages "by the difference between the contract price and the market value of the glucose at the times when Schenley was required to take delivery".

Two dates were before the trial Court as independent dates on which Engraw acquiesced, and the trial Court made findings relative to *both* dates.[3] In overlooking the second date (September 18, 1946) the Court created a basic contradiction in its opinion which it is impossible for the trial Court to resolve. The opinion adopts the rule relating to acquiescence and then appears to direct a measure of damages which, under the admitted facts, *conflicts* with the law *stated in the opinion.*

If, by its opinion, this Honorable Court meant to preclude the trial Court from considering any date other than the delivery dates *as fixed in the contract* we respectfully submit that it fell into error by overlooking:

1. Engraw itself established that on September 18, 1946, it did acquiesce in the repudiation. It did this

[3]Tr. pp. 65, 66.

by pleading (Exhibit "B", Amended Complaint)[4] and proving that on that date it notified Schenley, in writing, that it was no longer holding the glucose for deliveries under the contract but would sell it elsewhere and look to Schenley for damages, if any.

2. The trial Court specifically found the market value as of September 18, 1946,[5] on the theory that if there was any doubt as to whether Engraw acquiesced on June 6, 1946, there could be no doubt but that it did so in writing on September 18, 1946.

Exhibit "B" to Engraw's Amended Complaint is a copy of a letter dated September 18, 1946, acquiescing in the renunciation of the contract, and notifying Schenley of its intent to demand damages. It reads (Tr. p. 28):

"EXHIBIT 'B'

Hotel New Yorker
New York, N. Y.

September 18, 1946

Mr. Ralph Heymsfeld
Schenley Distillers Corp.
350 Fifth Avenue
New York, N. Y.

Dear Sir:

This is to notify you that the suppliers with whom we contracted for the 1135 tons of glucose which we sold to your Company have finally refused to accept cancellation of the contracts. We are, therefore, proceeding to sell the glucose at

[4]Tr. p. 28.
[5]Tr. p. 66.

best prices obtainable and will, of course, look to you for payment to us of the difference between the prices thus obtained and the price at which you contracted to purchase the same.

Your truly;
Compania Engraw Commercial
& Industrial S. A.
By G. Fred Berger"

There can be no question but that this letter expressly negatives deliveries to Schenley, and that it is, therefore, an acquiescence to Schenley's repudiation.

Engraw there elects *not* to hold the goods for the contemplated deliveries to Schenley. It elects to forego its right to insist that *Schenley* take the goods and adopts, in lieu thereof, its cause of action for damages.

The law applicable to this situation is clear from the decisions cited in "Brief of Appellee Schenley Distillers Corporation", pages 44 to 49, and, indeed, from the decision of this Honorable Court in this case.

Such an election as made by Engraw in the September 18, 1946, letter is irrevocable. *(Williston on Contracts* (Rev. Ed.), § 1334 and § 1335.) It destroyed Schenley's right to withdraw its repudiation and request deliveries, it relieved Engraw of its obligation to stand ready to deliver, and it terminated the contract as to both parties, except as a basis for an action for damages.

The statement in the Court's opinion that "Nothing at all in the record indicates that Engraw acquiesced in the repudiation" is inadvertently incorrect.

Under the law accepted in the opinion, the fact of acquiescence on September 18, 1946, requires that damages be fixed as of that date.

Since the trial Court specifically found a market price for September, 1946, petitioner submits that this Honorable Court could and should direct entry of judgment in an amount based upon that finding.

CONCLUSION.

Schenley's appeal was decided but not discussed in the opinion. Since the decision implies consideration of the issues raised by applicant Schenley, we do not feel free to re-argue our points. We are compelled to state, however, that the points made were meritorious and substantially supported by the law and the record cited in support thereof. Indeed, a company of petitioner's size that regularly and intentionally contracted in a manner as haphazard as this alleged contract was created, and in a manner binding only upon it, could not long exist on the American business scene. We respectfully suggest to this Honorable Court that the summary dismissal of our position, and the statements on page 3 of the opinion[6] which imply that such

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[6] "* * * For experience teaches that seldom is a defaulting party inarticulate in the assertion of some plausible reason for default. And the most common of these excuses is that there was no contract at all! * * *"

position is a mere expedient and sham, are not merited.

Turning to damages, under the rule, accepted by the opinion, "*where the seller does not acquiesce* in or accept the buyer's unilateral repudiation, market value at the time or times fixed for delivery in the contract controls in determining damages."

But the only fact determined by the opinion is that there was no acquiescence *on June 6, 1946.* The opinion overlooks the letter of September 18, 1946, pleaded and proved by Engraw (and discussed not only by petitioner, but by Engraw itself on pages 33 to 36 in its "Brief for Appellant"). This letter is a clear acquiescence by Engraw.

Petitioner respectfully submits that this Honorable Court should grant a rehearing or modify its decision either to itself fix damages, under the trial Court's findings, as of September 18, 1946, or to eliminate the direction to the trial Court which, under the admitted facts in the record, can be construed to preclude the trial Court from applying the law laid down in the opinion.

Dated, San Francisco, California,
March 29, 1950.

Respectfully submitted,
BRONSON, BRONSON & MCKINNON,
EDGAR H. ROWE,
Attorneys for Defendant, Appellant and Petitioner, Schenley Distillers Corporation.

CERTIFICATE OF COUNSEL.

The undersigned, one of the attorneys for Petitioner herein, hereby certifies that the foregoing Petition is well founded and that it is not interposed for delay.

Dated, San Francisco, California,
March 29, 1950.

EDGAR H. ROWE,
Of Counsel for Defendant, Appellant and Petitioner, Schenley Distillers Corporation.